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the judgment of the assessing authorities, but is apparently a question of fact to be ascertained by the courts and established as any other fact.[31]

Since Florida municipalities may assess the cost of local improvements against abutting property,[32] Florida courts could be of some assistance by interfering less in the assessing authority's determination as to when the abutting property is benefited by the particular improvements involved. If the assessing authorities' determination is reasonable, it should be final. While assessment should be subject to judicial review, it is not a judicial function.

WORKMEN'S COMPENSATION—LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT—SECONDARY INJURY FUND PROVISION

Claimant lost the sight of his right eye in an accident unconnected with industry or his employment. Subsequently, while employed by the defendant, he sustained an injury "arising out of and in the course of his employment" which destroyed his other eye, rendering him completely blind. The deputy commissioner found that under the Longshoremen's and Harbor Workers Compensation Act,[1] the claimant was permanently totally-disabled by the latter injury alone, and imposed liability for total disability upon the defendant. The employer secured a reversal of the commissioner's determination in the District Court for the Southern District of Florida, and this judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit. On certiorari *held*, that the employer is liable for the degree of disability which would have resulted had there been no previous injury. The second-injury-fund is liable for the balance necessary to equal compensation for total disability even though the first injury did not occur within either industry or plaintiff's employment.[2] Judgment affirmed. *Lawson, Deputy Comm'r v. Suwanee Fruit & Steamship Co.*, 69 Sup. Ct. 503 (1949).

Determining the proper basis for computing compensation awards when a previously-impaired-worker suffers a second injury, and as a result of the combined injuries becomes permanently totally-disabled has been a troublesome problem.[3] Not infrequently the courts adopt the view that the employee

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31. Atlantic Coast Line R. R. v. Lakeland, *supra*.
32. Prospere v. New Port Rickey, 98 Fla. 508, 124 So. 2 (1929).

1. 44 STAT. 1424 (1927), as amended, 33 U. S. C. § 901 (1946).
2. *Id.* §§ 908 (f) (1), 944 (In this chapter the second-injury-fund is referred to as the special fund. This fund is financed by payments which every employer or his insurance carrier is required to make for every injury causing the death of an employee who left no dependents entitled to compensation. All fines and penalties collected under the provisions of this act are also paid into this fund).
3. See Kossoris and Hammond, *Work Performance of Physically Impaired Workers*, 66 MONTHLY LABOR REV. 31, 33 (Jan. 1948); U. S. BUREAU OF LAB. STAT. BULL. No. 564, 266 (1932); U. S. BUREAU OF LAB. STAT. BULL. No. 536, 249 (1931).

should be granted full compensation from the current employer regardless of how the prior injury occurred—stressing the loss of earning capacity rather than the source of the infirmity.[4] While this view appears to be in complete harmony with the liberal construction, in favor of the injured employee, given to workmen's compensation laws, the consequences of such an interpretation are apparent.[5] If an employer is compelled to pay for permanent total-disability in second injury cases, he will be reluctant, or may even refuse, to employ partially-impaired workers.[6] To prevent employers from discriminating against handicapped workers some courts grant the employee compensation for the incapacity resulting from the second injury only, as if no prior disability existed.[7] Under these decisions inadequate provision is made for the now totally-disabled employee.[8] On the other hand, in order not to encourage discrimination in hiring disabled applicants, the liability of the employer for an injury should not be increased because of a worker's previously-impaired condition.

To resolve the inequitable consequences to both employee and employer the special indemnity fund was devised.[9] The combined injuries are treated as together causing permanent total-disability. However, the last employer is liable only for such permanent partial-disability as the last injury of itself caused. The balance of the award is made up from the second-injury-fund.[10] This appears to be the best solution to the problem.[11]

The Court of Appeals for the District of Columbia in interpreting a similar provision in the Longshoremen's and Harbor Workers Act held that the employer was liable for permanent total-disability where the employee's prior condition did not result from an accident in industry or out of previous employment.[12] To furnish an argument for this narrow construction of the

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4. Great Atlantic & Pacific Tea Co. v. Cardillo, 127 F.2d 344 (App. D. C. 1942); Killisnoo Packing Co. v. Scott, 14 F.2d 86 (C. C. A. 9th 1926); Congoleum Nairn v. Brown, 158 Md. 285, 148 Atl. 220 (1930); *In re* Branconnier, 223 Mass. 273, 111 N. E. 792 (1916); Matter of Schwab v. Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099 (1915).

5. *See* Temperance River Co. v. Legarde, 65 F. Supp. 161, 162 (D. Minn. 1946); Lehman v. Schmahl, 179 Minn. 388, 229 N. W. 553, 554 (1930).

6. *E.g.*, Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993 (1915); Lente v. Luci, 275 Pa. 217, 119 Atl. 132 (1922); Catlett v. Chattanooga Handle Co., 165 Tenn. 343, 55 S. W.2d 257 (1932).

7. See note 6 *supra*.

8. *See* Enrico v. Oliver Iron Mining Co., 199 Minn. 190, 191, 271 N. W. 456, 457 (1937); Lumbermen's Reciprocal Ass'n v. Gilmore, 258 S. W. 268, 270 (Tex. Civ. App. 1924).

9. *See* Matter of State Industrial Comm'r v. Newman, 22 N. Y. 363, 367, 118 N. E. 794, 795 (1918).

10. *E.g.*, McDonald v. Treasurer, 52 Idaho 535, 16 P.2d 988 (1932); Panther Creek Mines, Inc. v. Industrial Comm'r, 342 Ill. 68, 173 N. E. 818 (1930); Peters v. Archer-Daniels Midland Co., 233 Minn. 168, 26 N. W.2d 29 (1947); Peterson v. Halvorson, 200 Minn. 253, 273 N. W. 812 (1939); Ravelin Mining Co. v. Viers, 200 P.2d 433 (Okla. 1948).

11. See Acee, *State Legislation on Compensation for Second Injuries*, 61 MONTHLY LABOR REV. 284 (Aug. 1945).

12. National Homeopathic Hospital Association v. Britton, Deputy Comm'r, 147 F.2d 561 (App. D. C. 1945), *cert. denied*, 325 U. S. 857 (1945); *accord*, Temperance River

Act, the court did violence to the second-injury-fund provision. Emphasis was placed on the inadequacy of the special fund to meet the demands which would result from a contrary holding.[13] In the present case an opposite result was reached on a very similar fact situation. The value and the beneficial effect of the second-injury-fund would have been seriously impaired if the holding of the Court of Appeals of the District of Columbia had been followed. Employers again would have been placed in the position of either assuming the additional risk of liability or discriminating against physically handicapped workers. A large group of war-injured men seeking employment would have been classified as poor business risks, thus seriously hampering their opportunity for employment.[14]

The interpretation given the second injury provision in the principal case appears to be in accord with the avowed purpose of the Act,[15] and the construction given to similar state Workmen's Compensation Acts.[16] The inequity and unfairness of either total liability for the employer or lack of adequate compensation for the employee has been met by distributing the liability over the entire industry. The physically handicapped are encouraged to take their place in society rather than to become charges of the state.

Co. v. Legarde, 65 F. Supp. 161 (D. Minn. 1946); *Compare* Addotta v. Blunt, Comm'r of Labor, 114 N. J. L. 85, 176 Atl. 105 (1934), *with* Voessler v. Palm Fetchteler & Co., 120 N. J. L. 553, 1 A.2d 32 (1938).

13. *See* National Homeopathic Hospital Association v. Britton, Deputy Comm'r, *supra* at 564.

14. See McCahill, *Rehabilitation and Placement of Handicapped Workers*, 67 MONTHLY LABOR REV. 282 (Sept. 1948).

15. See note 10 *supra*.

16. For those states which now have second-injury-fund provisions in their Compensation Laws see ANALYSIS OF PROVISIONS OF WORKMEN'S COMPENSATION LAWS AND DISCUSSION OF COVERAGES 40 (1948) (prepared by the Insurance Department of the Chamber of Commerce of the United States).